In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1025

ROYAL COURT APARTMENTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner instituted this action in the Court of Claims to recover damages arising out of an allegedly wrongful mortgage foreclosure by the Federal Housing Administration ("FHA") against petitioner's rental housing project in St. Petersburg, Florida. The petition filed in the Court of Claims sought recovery for petitioner's capital investment in the property as well as for the amount of the deficiency judgment entered against petitioner in the foreclosure action (Pet. 11–12). Petitioner alleged that FHA had, by general directives and public statements, falsely induced mortgagors to believe that FHA mortgage terms on property such as that held by petitioner would be readjusted to meet new economic and com-

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petitive conditions. FHA's failure to abide by these representations allegedly resulted in petitioner's default and in the subsequent foreclosure proceedings which terminated with a judicial sale of the property and a deficiency judgment of $526,629.65. *United States* v. *Royal Court Apartments, Inc.*, Civil Action No. 4449–T, M.D. Fla., Tampa Division. The Court of Claims granted the government's motion for judgment on the pleadings on the ground that petitioner's claim was "barred by the doctrine of res judicata since all of [petitioner's] claim could and should have been presented in defense of the foreclosure action" (Pet. App. 1a).

The Court of Claims' decision was correct. The essence of petitioner's claim in that court was that the mortgage foreclosure was unjustified; the proper forum in which that contention should have been asserted was the district court in which the foreclosure proceeding was instituted.[1] Had petitioner prevailed in that court, the mortgage would not have been foreclosed and the resulting injury, for which recovery was sought in the Court of Claims, would never have been suffered. It would obviously be inconsistent with the principles of res judicata to

[1] In its original answer in the district court, petitioner did, in fact, allege that it had relied upon representations by the Federal Housing Administration as a defense to the foreclosure proceedings. Subsequently, by stipulation of the parties, that answer was withdrawn and an amended answer was filed denying generally the allegations of the complaint and requesting that the court reject the government's prayer for a deficiency judgment.

permit petitioner to reargue its defenses to the foreclosure proceeding in the Court of Claims as grounds for a judgment against the United States in the amount of the loss suffered as a result of the foreclosure.

Petitioner's contention that these facts could not have been asserted in the district court in the form of a compulsory counterclaim because the amount of the claim exceeded the jurisdictional limitation of 28 U.S.C. 1346 (Pet. 13–16) is beside the point. The relevant question is not whether the facts now alleged could have supported a counterclaim but whether they could have been asserted as an affirmative defense. In *United States* v. *Woodland Terrace, Inc.*, 293 F. 2d 505, 507–510 (C.A. 4), certiorari denied, 368 U.S. 940, a similar affirmative defense was made and considered in an FHA mortgage foreclosure proceeding. Since the defense, if successful, would have prevented the injury suffered by petitioner, the Court of Claims properly concluded that it could not be raised as a basis for relief in that court.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966